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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 234

G. F. ALBIN,

Petitioner.

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, AN UNINCORPORATED COMPANY, ETC., ET AL.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX.

CITATIONS.

STATUTES CITED.

TEXT CITED.

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OPINIONS BELOW.

Neither the Circuit Court of Appeals for the Seventh Circuit nor the District Court of the United States for the Northern District of Illinois, Eastern Division, rendered any opinions in this case.

JURISDICTION.

The order of the Circuit Court of Appeals was entered April 23, 1942 (R-22), and a Petition for rehearing was denied May 16, 1942.

STATEMENT.

This proceeding is an application for review of an order of the Circuit Court of Appeals for the Seventh Circuit dismissing an appeal from an interlocutory order (R-15), vacating a restraining order entered on February 21, 1942 (R-9) on motion of petitioner restraining proceedings in which the respondent was the party plaintiff, and particularly a proceeding pending in the Superior Court of Cook County, Illinois case Number 34 S 18698, entitled "*Felix Kilbride, etc.* v. *Masterson et al.*" (hereinafter referred to as the Superior Court Case).

The order entered on February 21, 1942, was entered without notice to the respondent, but with notice to Thomas Hart Fisher, an attorney at law practicing in Chicago, Illinois, (hereinafter in this brief referred to as "Fisher") (R-19).

On March 20, 1942, the respondent filed his answer to the petition for adjudication (R-3) setting forth in substance the following defenses to the petition for adjudication:

(1) The respondent is not insolvent.

(2) The respondent has more than twelve creditors in number, but the petition for adjudication was filed by only one creditor.

(3) The so-called petitioning creditor, G. F. Albin, is not a person entitled to file a petition for adjudica-

tion and in fact is acting for and on behalf of Fisher who is a debtor and not a creditor of the respondent.

The detailed facts which support the allegation that Fisher is the true owner of the claim on which the petition for adjudication purports to be predicated are set forth in the respondent's answer (R-5) and in the petition to vacate the restraining order, filed March 20, 1942 (R-10).

As appears from the pleadings in this proceeding Fisher filed no counterclaim or claim for affirmative relief in the Superior Court Case, and the order entered on March 26, 1942 is not an order permitting the prosecution of a proceeding against the respondent. On the contrary, it is an order permitting the prosecution of a proceeding by the respondent against Fisher for the purpose of collecting assets of the respondent. The collection of such assets pending hearing on the petition for adjudication, rests in the sound discretion of the District Court. If Fisher has any claim for affirmative relief against the respondent, he did not present the same for adjudication in the Superior Court Case. The proceeding in the Superior Court Case, which petitioner sought to restrain involved only a petition by respondent against Fisher (R-10) (R-8) to recover a sum in excess of $11,000.00 held by Fisher and belonging to petitioner. The title of said Superior Court case should not mislead the Court as the issues of the original proceedings were determined by final decree entered January 15, 1937. The pending petition therein against Fisher was predicated on the retention by the Chancery Court in said decree of jurisdiction of the trust there involved and attorney and client relation between Fisher and the respondent in said case.

Subsequent to the entry of the order by the District Court on March 26, 1942, the issues of the petition for adjudication in bankruptcy and the respondent's answer were referred to and are pending before a referee in bankruptcy. Several hearings have been had and Fisher, who became an attorney of record for the petitioner, G. F. Albin, in the District Court Case, will be permitted to introduce further evidence on such issues, if any he has, on September 8, 1942. If respondent is adjudged bankrupt and a trustee appointed or if the bankruptcy proceeding is dismissed, the order entered on March 26, 1942, will be of no significance. It is anticipated that said proceedings will be concluded before the issue herein can be determined by this Court and the questions involved therefore are academic.

The answer of respondent (R-6) and the petition to vacate the restraining order (R-12), allege that the bankruptcy proceeding was instituted for the sole purpose of defeating the claim of the respondent against Fisher, and that consistent with this purpose, the petitioner forthwith, upon the acquisition of his claim from the trustee in bankruptcy for Peter Masterson individually (R-5), filed this proceeding, (R-1) and without notice to the respondent, caused the restraining order, which was dissolved on March 26, 1942, to be entered. Notwithstanding the motive for the institution of this proceeding, it is to the best interest of the petitioner's estate that the proceedings pending in the Superior Court of Cook County, Illinois, be completed, and if the petitioner be adjudged a bankrupt, the recovery in said proceeding will inure to the benefit of the bankrupt estate.

QUESTIONS INVOLVED.

The respondent states that the questions properly involved in this application for Certiorari are the following:

1. Did the Circuit Court of Appeals for the Seventh Circuit lack jurisdiction of an appeal from an interlocutory order vacating an order, entered in a bankruptcy proceeding by the District Court, restraining the prosecution of litigation in the State Courts by the alleged bankrupt against others pending adjudication?

2. Is the entry of a restraining order by the District Court pending hearing on a petition for adjudication in bankruptcy mandatory under Chapter III, Section 11 of the Bankruptcy Act of 1938 where

A. The application for the restraining order seeks to restrain proceedings *by* rather than *against* the alleged bankrupt, and

B. The application for the restraining order is not made by the alleged bankrupt, but is made by a creditor of the alleged bankrupt.

REASONS FOR DISALLOWANCE OF WRIT.

It is submitted, as will more fully appear from the respondent's brief, that the petitioner erroneously relies on Sections 11 and 24 of the Bankruptcy Acts of 1898 and 1938 and Section 129 of the Judicial Code in support of his application for a writ of Certiorari.

It is conceded that the Bankruptcy Act of 1938 permits appeals as a matter of right in certain *proceedings* in bankruptcy, either interlocutory or final, which prior to the Bankruptcy Act of 1898 were appealable only upon

petition for leave to appeal. However, the petitioner erroneously assumes that the Bankruptcy Act of 1938 enlarged the scope of the appellate review by making reviewable certain types of interlocutory orders, which prior thereto, were not reviewable on petition for leave to appeal. As will later more fully appear, the respondent submits that the Bankruptcy Act of 1938 did not broaden the scope of appeal.

Petitioner further contends that Section 129 of the Judicial Code permits appeals as a matter of right from interlocutory orders vacating or denying *restraining* orders. It is submitted that this conclusion of the petitioner is erroneous and, as will appear from the respondent's brief, Section 129 of the Judicial Code applies only to *injunctions* as distinguished from *restraining* orders.

It is further submitted that the petitioner has misconceived the purpose of Section 11 (a) of the Bankruptcy Act of 1898. This section has been incorporated in the act for the benefit of the alleged bankrupt or bankrupt, and does not authorize the District Court to restrain proceedings by an alleged bankrupt against others, or to restrain proceedings to which the alleged bankrupt is party, upon application of a creditor of the alleged bankrupt.

Therefore, the petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

BRIEF AND ARGUMENT.

I.

The order entered March 26, 1942 is not an appealable order.

Although Section 24 of the Bankruptcy Act of 1898 as amended vests the United States Circuit Courts of Appeals with appellate jurisdiction from the several courts of bankruptcy in proceedings in bankruptcy *"other interlocutory or final"*, the amendment effected by the Chandler Act permitting review upon appeal in lieu of petition for leave to appeal or petition to revise merely altered the method of review, but did not enlarge the scope of appellate review. Prior to the Chandler Act, certain types of interlocutory orders were reviewable. Other types of interlocutory orders were not reviewable. Only the orders reviewable prior to the Chandler Act by petition for leave to appeal or to revise are now reviewable on appeal. The rule is stated in *Remington on Bankruptcy*, Volume 8, Section 3768:

> "The Chandler Act continues the jurisdiction to review both interlocutory and final orders in proceedings. It gives an appeal of right unless less than $500.00 is involved, while under prior law, an appeal could not be taken unless allowed by the Appellate Court. The cases under subdivision (b) of Section 24 as originally enacted in which Circuit Courts of Appeals refused to allow appeals on the ground that certain kinds of interlocutory orders in proceedings are not appealable, remain authoritative. The Chandler Act has made no change in

the law as to the appealability of interlocutory orders in proceedings."

In *Hochn* v. *McIntosh* (C. C. A. 6 1940), 110 Fed. (2d) 199, an appeal was taken from an order permitting the sale of certain property in the State Court. The appellee urged that the appeal was premature and the question arose whether the appeal might not be proper under the Chandler Act, even though improper prior thereto. The Court said:

> "The Statute, as it existed prior to the amendment, has been considered in numerous decisions, the rationale of which is that appeals from purely intermediate and preliminary orders should be allowed only in exceptional cases. So far as is material to the question under consideration, the amendment made no change in the law. Before reviewable, administrative orders must have a certain degree of finality. The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that rights may be definitely determined by review. *Triangle Electric Company* v. *Foutch*, 8 Cir. 40 F. (2d) 353; *Board of Road Comr's* v. *Keil*, 6 Cir., 259 F. 76; *In re Fox West Coast Theatres*, 9 Cir., 88 F. (2d) 212; *In re Throckmorton*, 6 Cir., 196 F. 656."

It generally has been held that orders dissolving restraining orders are of such an interlocutory nature that they are not appealable for the reason that they do not constitute a final adjudication of the rights of the litigants.

In re National Finance and Mortgage Corporation (C. C. A. 9, 1938), 96 Fed. (2d) 74, the District Court

entered an order dissolving an order temporarily restraining proceedings prohibiting the trustee for bondholders from selling realty secured by a trust deed conveying property owned by the bankrupt corporation. The Circuit Court of Appeals dismissed the appeal, stating that the restraining order was not the equivalent of an injunction within the meaning of Sections 128 and 129 of the Judicial Code as amended, 28 U. S. C. A. Sections 225, 227, and therefore was not an appealable order. The Court said:

> "Section 129 provides for appeals where an injunction is (*inter alia*) 'refused, or dissolved by an interlocutory order or decree.' In the present case the order appealed from recites the issuance of restraining orders and of an order to show cause why appellee should not be enjoined. However, the decretal portion of the order goes no further than to dissolve the temporary restraining order. It is entirely silent upon the subject of injunction. Thus, while this order did purport to dissolve a temporary restraining order it did not 'refuse or dissolve' an injunction, and consequently is not appealable under section 129. *Pack* v. *Carter*, 9 Cir. 1915, 223 F. 635; *Pressed Steel Car Co.* v. *Chicago & Alton R. Co.*, 7 Cir. 1911, 192 F. 517, 519; *Bank of America Nat. Trust & Savings Ass'n* v. *Cuccia*, 9 Cir. 1937, 93 F. (2d) 754."

Appeals from interlocutory orders are denied where the interlocutory order contains no final adjudication. The theory of these denials is expressed in *In re Chotiner* (C. C. A. 3, 1914), 218 Fed. 813, wherein the appeal was dismissed. The Court said:

> "The opinion of the District Judge in this case is reported in 216 Fed. at page 916. We recognize the desirability of deciding the conflict of opinion in this circuit on the point in dispute (*Re Codori* (D. C.) 207 Fed. 784), and we regret that this record presents no reviewable question. Section 24b does

not require us to revise every interlocutory order that may affect the course of a bankruptcy proceeding, whatever the nature or scope of the order may be; and we need hardly add that it is not part of our duty to answer questions, unless they arise in a proper appellate proceeding. Under section 24b we can only be asked to review such orders or decrees when they have a certain degree of definiteness and finality. Moreover, there must always be numerous minor matters of administration in which the District Court should be allowed to exercise a sound discretion that will ordinarily not be disturbed.

"In the case before us the court has taken no positive, affirmative, step in the cause, and has done nothing to affect definitely the rights of the petitioner. The record discloses merely an order by the District Judge reversing an order of the referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee. Collier (9th Ed.) 530; Black, Sec. 52; *Sturgiss* v. *Corbin* (C.C.A. 4th Cir.), 141 Fed. 1, 72 C. C. A. 179."

Likewise, see *Remington on Bankruptcy*, Volume 8, Section 3769.

None of the cases cited by the Petitioner on pages 12-19 of his brief support his statement that a restraining order of the nature entered by the District Court on February 21, 1942 and dissolved on March 26, 1942, is an appealable order under Section 129 of the Judicial Code, or that such a restraining order is the equivalent of an injunction. The restraining order involved in this case purports to have been a routine restraining order entered under Section 11 (a) of the Bankruptcy Act. It is not the equivalent of an order entered on a complaint in equity and answer, or on a petition and answer, invoking the general equitable powers of courts. It merely purported to be a perfunctory routine order of the nature

customarily entered in bankruptcy proceedings by authority of the Bankruptcy Act. We will proceed to distinguish the cases cited by the petitioning creditors-appellant.

Enelowe v. *New York Life Insurance Company*, 1934, 293 U. S. 379, 79 L. Ed. 440, and *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation*, 1934 293 U. S. 449, 79 L. Ed. 583, were companion cases decided at the same term of Court. The issue involved in these cases was the power of a court of equity to restrain proceedings at law between the same parties to enable the parties litigant to interpose equitable defenses under the provisions of Section 274(b) of the Judicial Code. As the Court pointed out in the Enelowe Case at page 383, this was the exercise by a court in a proceeding of the same general equitable powers that in the absence of the provisions of the Judicial Code would be exercised by a separate complaint in equity. The Court stated:

> "It is thus apparent that when an order or decree is made under Section 274 (b) requiring or refusing to require that an equitable defense shall first be tried, the Court exercises what is essentially an equitable jurisdiction and in effect grants or refuses an injunction restraining proceedings at law precisely as if the Court had acted upon a bill of complaint in a separate suit for the same purpose."

The Court in these cases, therefore, properly came to the conclusion that as the order in substance and effect was an injunction, the designation of the order as a restraining order was not of significance under Section 129 of the Judicial Code.

The same distinction is apparent on an examination of the case of *Griesa* v. *Mutual Life Insurance Company*, 1908, 165 Fed. 48, cited by the petitioner.

The case of *McGonigle* v. *Foutch*, 1931, 51 Fed. (2d)

455, although a bankruptcy case, is not comparable to the present situation. In that proceeding the trustee in bankruptcy, upon notice and after hearing, obtained an order restraining persons having substantially adverse rights from those of the bankrupt estate from proceeding in the State Court. The proceeding before the referee was in the nature of an injunction proceeding to enjoin State Court proceedings against the trustee in bankruptcy. The issue involved was not a perfunctory restraining order which might be entered as a matter of course under the provisions of the Bankruptcy Act. The case, therefore, is not in point.

The same comment applies to the case of *Seattle Curb Exchange* v. *Knight*, 1931, 46 Fed (2d) 34. This case likewise involved an order restraining proceedings against a trustee in bankruptcy in the State Court, after a hearing. The order entered in that case, as will appear even from the brief of the petitioner, was referred to as an injunction order and not a restraining order.

The case of *General Electric Company* v. *Marvel Metals Co.*, 287 U. S. 430, was an ordinary counterclaim in a patent suit, and is not pertinent to the issues of this case.

Field v. *Kansas City Refining Company*, 296 Fed. 800, was not a bankruptcy case and likewise is not in point. As a matter of fact, in that case the Court said:

> "Not only was the order in effect a temporary injunction, but it was such in name also."

The case of *Western Union Telegraph Company* v. *United States M. A. T. Co.*, 1915, 221 Fed. 545, involved the exercise of ordinary equity jurisdiction in an insolvency proceeding, and did not involve a perfunctory restraining order. It will be noted from an examination of this case that the trial court itself in referring to its

own order designated the same as a "restraining order and injunction."

It is submitted, therefore, that the authorities cited by the petitioner do not support the statements contained in his brief.

As the order entered March 26, 1942, from which the appeal is taken, is not appealable, the Circuit Court of Appeals may either enter an order dismissing the appeal or affirming the order of the District Court.

Federal Land Bank of Springfield v. *Hansen*, (C. C. A. 2, 1940), 113 Fed. (2d) 82.

II.

(a) An order restraining proceedings by an alleged bankrupt is not within the scope of Section 11(a) of the Bankrupt Act.

The pleadings filed by Fisher in the Superior Court of Cook County, Illinois, contain no prayer for affirmative relief. The Civil Practice Act of the State of Illinois requires that claims for affirmative relief shall be contained in a counterclaim. Section 35 of the Civil Practice Act of the State of Illinois, 110 Smith-Hurd Illinois Annotated Statutes, Section 162, provides as follows:

> "(1) Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of set-off, recoupment, cross-bill in equity or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be

pleaded as a cross-demand in any action, and when so pleaded shall be called a counterclaim.

"(2) The counterclaim shall be a part of the answer, and shall be designated as a counterclaim.

"(3) Every counterclaim shall be pleaded in the same manner and with the same particularity as a complaint, and shall be complete in itself, but allegations set forth in other parts of the answer may be incorporated by specific reference instead of being repeated."

Not only did Fisher fail to file a counterclaim in the State Court proceedings in accordance with the rules, but he did not request affirmative relief in the answer or supplemental answer filed by him. Furthermore, the petition for the restraining order, filed on February 21, 1942, alleges that a counterclaim was filed, only upon information and belief. The information and belief of the petitioner obviously is misconceived. The restraining order entered on February 21, 1942, therefore restrained a proceeding *by* the alleged bankrupt and in so far as it applied to the said Superior Court case, did not restrain a proceeding *against* the alleged bankrupt. Title to this claim remains in the alleged bankrupt, notwithstanding the filing of the petition. The rule is stated in *Remington on Bankruptcy*, Volume 4, Section 1364, as follows:

"In the meantime, the bankrupt has sufficient title to maintain suits in his own name, at any rate where no receiver has been appointed, or where title and not merely possessory right is essential to maintenance of the suit."

The leading case in support of this rule of law is *Johnson* v. *Collier*, 1912, 222 U. S. 538, 56 L. Ed. 302, in which the Court said:

"While for many purposes the filing of the petition operates in the nature of an attachment upon choses

in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication.

"Until such election the bankrupt has title,—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court, in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of, rights and priorities thereby acquired. *Thatcher* v. *Rockwell*, 105 U. S. 469, 26 L. Ed. 950."

The rule is stated also in *Danciger* v. *Smith*, 1928, 276 U. S. 542, 72 L. Ed. 691. In this case the bankrupt had assigned certain claims. Following adjudication suit was started by the bankrupt on these claims and the defense was interposed that by reason of the bankruptcy, the bankrupt had ceased to be the owner of the cause of action and was not entitled to prosecute the suit. The defendants contended that by permitting a bankrupt to continue the prosecution after adjudication, they were deprived of a right, privilege and immunity under the Bankruptcy Act. In reviewing this contention and in permitting the continuation of the proceeding, the Court

quoted with approval from *Johnson* v. *Collier*, and further said:

> "It is clear that under these provisions (of the Bankruptcy Act, U. S. C. title 11) an adjudication in bankruptcy, until followed by the appointment of a trustee, does not divest the bankrupt's title to a cause of action against a third person or prevent him from instituting or maintaining suit thereon. Thus, he may institute and maintain such a suit before the election of a trustee (citing cases). Or, if no trustee is appointed (citing cases) it follows that Smith's title to the right of action was not divested by the proceeding in bankruptcy, no trustee having been appointed to whom it could pass; and that the Bankruptcy Act did not prevent him from subsequently prosecuting the suit to judgment."

In the later case of *In re Olsen, O'Neill* v. *Lange, et al.*, (C. C. A. 2, 1934), 70 Fed. (2d) 253, the Court said:

> "Moreover, a stay granted upon the appointment of a receiver would be pursuant to section 11a of the Bankruptcy Act (11 U. S. C. A. Sec. 29(a)) which refers to suits or actions pending against a person at the time of the filing of the petition against him. To stay suits previously instituted by the bankrupt would require an order of the court obtained by the trustee."

Restraint of proceedings *by* (and not *against*) an alleged bankrupt, is not within the scope of Section 11(a) relied upon by the petitioner-creditor-appellant. The restraint of all proceedings other than such restraining orders as may be mandatory before adjudication under Section 11(a) rests within the sound discretion of the District Court. The rule is stated in *Remington on Bankruptcy*, Volume 8, Section 3804, as follows:

> "The Appellate Court's discretion must not be substituted for that of the lower court."

To the same effect are:

New River Coal Company v. *Ruffner Brothers* (C. C. A. 4, 1908), 165 Fed. 881.

In re Lesser, (C. C. A. 2, 1900), 99 Fed. 913, and

In re S. W. Straus & Co., Inc. (D. C. N. Y. 1934), 6 Fed. Supp. 547, which will be discussed later.

The comment of the court in *In re Margolies* (C. C. A. 2, 1920), 266 Fed. 203, is noteworthy.

> "We have pointed out that under the statute discretionary orders can be revised only for abuse of discretion, which is error of law (*In re Weidenfeld*, 254 Fed. 680, 166 C. C. A. 175) and that while we can review interlocutory proceedings, it is not advisable so to do (*In re Strauss*, 211 Fed. 123, 127 C. C. A. 521; *In re Horowitz*, 250 Fed. 106, 162 C. C. A. 278). As, however, this record raises nothing but a question of jurisdiction, and one of some novelty, we conclude to entertain the petition, as an exception to, and not a relaxation of, the general rule above stated."

It is submitted, therefore, that even if the order appealed from should be considered an appealable order, the record so clearly supports the order entered by Judge Barnes on March 26, 1942 that the order entered by him ultimately must be affirmed.

(b) Section 11 (a) relied on by the petitioner as authority for his appeal is a provision for the sole benefit of the alleged bankrupt, and does not authorize the District Court to restrain proceedings on application of persons other than the alleged bankrupt before adjudication, or the bankrupt after adjudication.

The peitioner relies solely on Section 11 (a) as authority for the restraining order. Conceding for the moment

that there is merit to the contention of the appellant that the order entered on March 26, 1942, affects proceedings against the bankrupt, and conceding further that the restraining order would be entered upon proper application of the bankrupt and that upon such application the order would be mandatory before adjudication, the protection afforded by Section 11 (a) is for the benefit of the bankrupt and may be waived by him. If the bankrupt does not request the entry of a restraining order, there is no authority which permits a creditor to obtain such an order. The rule is stated in Remington on Bankruptcy, Volume 7, Section 3467 as follows:

> "The stay under Section 11 (11 U. S. C. A. Sec. 29) is for the benefit of the bankrupt to enable him to interpose his discharge. And it is only under this provision that the bankrupt may apply to the bankruptcy court for a stay to protect his discharge. *It is not under this provision that the bankruptcy court acts in staying or restraining suits or proceedings affecting the property of the bankrupt belonging to creditors.*" (Italics supplied.)

The rule is stated also in 8 Corpus Juris Secundum, Section 491, at page 1366, referring to Section 11 of the Bankruptcy Act:

> "This section is controlling and determinative of the right to stay *where the application for a stay is made by the bankrupt, or alleged bankrupt,* himself in an ordinary bankruptcy proceeding. The purpose of this Section and of a stay granted thereunder is to relieve the bankrupt pending his application for discharge from being unnecessarily harassed by creditors holding dischargeable claims and to preserve the *status quo* in civil actions against him until he shall have an opportunity plead or set up his discharge." (Italics supplied.)

In the same work it is stated at page 1369:

> "The provision of the Bankruptcy Act which permits the bankrupt to obtain a stay of suits against him is primarily for his benefit and the right conferred thereby may be waived by him."

The following cases support this rule of law:

Johnson Dry Goods Company v. *Drake*, 121 Southern 402, 219 Ala. 150.

Craig v. *Cameron*, 108 S. E. 828; 27 Ga. App. 455.

Hamilton v. *First State Bank of Garrison*, 220 N. W. 644, 57 N. Dak. 142.

In re S. W. Straus & Co., Inc., D. C. N. Y. 1934, 6 Fed. Supp. 547.

In re Hoey Tilden & Co., D. C. N. Y. 1922, 292 Fed. 269.

In *In re S. W. Straus & Co., Inc.*, (D. C. N. Y.), 6 Fed. Supp. 547, in an involuntary proceeding prior to adjudication, the petitioner sought an order restraining certain proceedings against the bankrupt. In denying the claim that such an order should be entered under Section 11 (a), the Court said:

> "The power of the bankruptcy court to stay suits brought in other courts, state or federal, relates to two types of cases. The first is the restraining of suits brought against the bankrupt on claims that in their nature are dischargeable in bankruptcy. This power is expressly conferred by section 11a of the Bankruptcy Act (11 U. S. C. A. Sec. 22(a)). The purpose is to relieve the bankrupt from being unnecessarily harassed by creditors pending his application for discharge. *In re Nuttal* (D. C.), 201 F. 557, 559. The exercise of this power is an everyday occurrence; as a general rule the bankrupt himself is the party who invokes it and the suit involved is generally a suit to establish a personal liability. The present application is obviously not of this sort, though both the moving party and the plaintiffs refer in their memoranda to the provisions of Section 11."

It is manifest that each and every case cited by the petitioner as authority under Section III of his brief is a proceeding in which the application for a restraining order was made by the bankrupt or alleged bankrupt himself and no case is cited in which a restraining order was entered on the application of a creditor. It is submitted, therefore, that conceding for the moment that the order entered on March 26, 1942, restrained proceedings against the bankrupt, an application in accordance with the Statute was not made for the restraint of such proceedings.

CONCLUSION.

For the reasons herein set forth the decision below is correct and the petition for a writ should be denied.

Respectfully submitted,

PETER MASTERSON, not personally but as trustee under the four-party Trust Agreement dated August 5, 1921 by and between JOHN P. COWING, ET AL., Respondent.

By CHARLES AARON,
SIDNEY J. HESS, JR.,
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Counsel for Respondent.